

① Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID E. FISCHER,
LANCE CORPORAL,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition For Writ of Certiorari To The
United States Court of Appeals for the Armed Forces*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the pay of active duty servicemembers suspected of violating the Uniform Code of Military Justice subject to forfeiture before they have been convicted by a duly constituted court-martial?

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IN THE SUPREME COURT OF THE UNITED STATES

Lance Corporal David E. Fischer, Petitioner,
v.
United States, Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES**

Lance Corporal David E. Fischer, United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The Court of Appeals' denial of Petitioner's petition for reconsideration is unpublished at 2005 C.A.A.F. LEXIS 1211 (C.A.A.F. 2005). App. A, *infra*, at 1a. The opinion of the Court of Appeals for the Armed Forces is published at 61 M.J. 415 (C.A.A.F. 2005). App. B, *infra*, at 2a. The opinion of the Navy-Marine Corps Court of Criminal Appeals is published at 60 M.J. 650 (N-M. Ct. Crim. App. 2004). App. C, *infra* at 26a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on September

2, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution reads, in part:

No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law....

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 813 states:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

10 U.S.C. § 857(a)(3) states:

A forfeiture of pay and allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect.

37 U.S.C. § 204(a)(1) states:

The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title—

- (1) a member of a uniformed service who is on active duty....

REGULATORY PROVISION INVOLVED

Department of Defense Financial Management Regulation volume 7A, chapter 3, subparagraph 010302.G.4. states:

If a member is confined awaiting court-martial when the enlistment expires, pay and allowances end on the date the enlistment expires. If the member is acquitted when tried, pay and allowances accrue until discharge.

STATEMENT

At his general court-martial, Petitioner filed a motion for sentencing credit arguing that a Department of Defense Financial Management Regulation that terminated his pay and allowances forty-one days before his court-martial amounted to illegal pre-trial punishment prohibited by Article 13, Uniform Code of Military Justice, 10 U.S.C. § 813 (2000) and the Fifth Amendment to the Constitution. The military judge denied Petitioner's motion. In a 7-2 decision, the

Navy-Marine Corps Court of Criminal Appeals, sitting *en banc*, affirmed. In a 3-2 decision, the Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals. Petitioner petitioned the Court of Appeals for reconsideration. The Court of Appeals denied that petition on October 17, 2005.

A. A Service Member's Entitlement to Pay

In *Bell v. United States*, 366 U.S. 393, 401 (1961), this Court held that an active duty service member's entitlement to pay is dependent upon statutory right. All servicemembers on active duty in the armed forces are entitled to pay. 37 U.S.C. § 204(a)(1) (2000). In *Bell*, this Court noted that a service member who has not been punished at a court-martial "is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be." *Bell*, 366 U.S. at 401. This Court specifically rejected the argument by the United States that the plaintiffs in *Bell* were not entitled to pay and allowances because they were no longer performing their normal duties. *Bell*, 366, U.S. at 405, 408. "The rule has commanded unquestioned adherence throughout our history...." *Bell*, 366 at 405.

In 1951, the Comptroller General of the United States opined that active duty servicemembers, retained on active duty for trial by court-martial, were not entitled to pay unless they were ultimately acquitted of their suspected offenses. 30 Comp. Gen. 449 (1951). That opinion is the cited basis for Department of Defense Financial Management Regulation volume 7A, chapter 3, subparagraph 010302.G.3-4 (FMR). According to the FMR, once an active duty service member has reached his end of active obligated service (EAS), he is no longer entitled to pay unless he is in a "full duty-status."

Id. Confinement awaiting trial is not considered “full duty.”

Id. If a service member in pre-trial confinement is later acquitted of his suspected offenses, he is entitled to full pay and allowances until discharge. *Id.*

Petitioner was placed in pre-trial confinement on May 4, 2001. On June 29, 2001, Petitioner reached his EAS. He was convicted forty-one days later on August 9, 2001. During that forty-one-day-period, Petitioner received no pay or allowances.

B. Proceedings Below

The military judge held that the termination of Petitioner’s pay was not punitive and was reasonably related to the legitimate government objective of ensuring “that individuals who are not performing normal work duties do not receive payment that is unearned and may later be difficult to recover.”

The Navy-Marine Corps Court of Criminal Appeals agreed. “This regulation denies payment to those servicemembers who do not continue to serve in a **full duty** status and provide productive service in furtherance of the military mission....” *Fischer*, 60 M.J. at 653. Citing *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979), the Navy-Marine Corps Court of Criminal Appeals found the FMR related to a legitimate non-punitive government interest and affirmed the decision of the military judge.

Judges Villemmez and Harris dissented. “To completely cut off one’s statutory pay entitlement, due solely to being in pretrial confinement, after the individual’s now-rendered-meaningless original EAS, serves no legitimate governmental objective.” *Fischer*, 60 M.J. at 659 (Villemmez, J. dissenting). The FMR is “clearly pretrial punishment and a violation of

basic due process.” *Id.* at 658. The dissent concluded, “the regulation must implode from the excess weight of its own illogicalness. While its intent may be admirable-saving the Government money-its effect is to impose an impermissible form of pretrial punishment or penalty on the Appellant....” *Id.* at 660.

A majority of the Court of Appeals for the Armed Forces affirmed. The Court of Appeals held that a service member’s entitlement to pay ends at EAS – even though he remains on active duty. *Fischer*, 61 M.J. at 418. The Court of Appeals further held that only servicemembers who perform “productive work may be paid.” *Id.* A service member held in confinement, and thus not performing useful duties, may be paid only if he is later acquitted by a court-martial. *Id.* The Court of Appeals found the FMR to be neither implicitly punitive nor punitive in effect. *Id.* at 421. The Court reasoned that the FMR furthered the legitimate government “interest in terminating the pay of persons who are not performing productive service.” *Id.* at 421.

The Chief Judge and Judge Erdmann dissented. “One of the basic guarantees of the Due Process Clause is that a pretrial detainee cannot be punished until there is a finding of guilt.” *Fischer*, 61 M.J. at 418 (Erdmann, J. dissenting). The dissent noted that court-martial jurisdiction, like military pay, is status based. Furthermore, Petitioner remained on active duty through disposition of the charges against him. *Id.* at 423. The dissent reasoned that the Court’s opinion allows the government to “imprison a presumptively innocent individual, unilaterally continue military status with all its obligations and duties and at the same time take away one of the basic rights associated with active duty military status-the right to pay.” *Id.* at 423. Because Petitioner’s pay would not have been terminated except for his placement in pretrial